

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Implement the Federal)
Communications Commission's)
("FCC") Triennial Review Order,)
FCC No. 03-36.)
_____)

DOCKET NO. 03-0272

ORDER NO. 20712

Filed Dec. 11, 2003
At 1:00 o'clock P.M.

Chief Clerk of the Commission

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)	
PUBLIC UTILITIES COMMISSION)	Docket No. 03-0272
Instituting a Proceeding to)	
Implement the Federal)	Order No. 20712
Communications Commission's)	
("FCC") <i>Triennial Review Order</i> ,)	
FCC No. 03-36.)	
_____)	

ORDER

I.

Background

The commission initiated this proceeding to implement the Federal Communications Commission's ("FCC") *Triennial Review Order*¹ by Order No. 20471, filed on September 29, 2003 ("Order No. 20471" or the "Order").²

¹In *Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147; Report and Order on Remand and Further Notice of Proposed Rulemaking; FCC No. 03-36; Adopted February 20, 2003; Released August 21, 2003 ("*Triennial Review Order*" or "*TRO*").

²The FCC established new rules governing the obligations of incumbent local exchange carriers ("ILECs") to make elements of their network available on an unbundled basis to competitive local exchange carriers ("CLECs") and, among other things, delegated to state commissions, pursuant to section 251(d)(2) of the Telecommunications Act of 1996, the task of undertaking proceedings to determine the unbundling obligations of ILECs concerning certain network elements in specific geographic markets through the *TRO*.

The commission, in Order No. 20471, also:

- (A) Designated the current Docket No. 7702 parties--the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"); AT&T COMMUNICATIONS OF HAWAII, INC. ("AT&T"); PACIFIC LIGHTNET, INC. ("PLNI"); SPRINT COMMUNICATIONS COMPANY, L.P. ("Sprint"); TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS ("Oceanic"); UNITED STATES DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES ("DOD"); and VERIZON HAWAII INC. ("Verizon Hawaii")--as initial parties to this proceeding (collectively, "Initial TRO Parties"), and ordered them to either file a letter notifying the commission of their duly authorized representative(s) for this docket, or submit a written request for commission approval to withdraw from this docket within twenty (20) days from the filing of the Order;
- (B) Invited any interested individual, entity, or community or business organization to intervene as a party or to participate without intervention in this proceeding by filing a motion to intervene as a party or to participate without intervention not later than twenty (20) days from the filing of the Order; and
- (C) Required any CLEC wishing to rebut the FCC's no impairment finding for switching for large business customers served by large capacity loops, such as DS-1s, in a proceeding before the commission ("90-day Proceeding") to file a motion to proceed with the 90-day Proceeding, in adherence with specific filing requirements, within twenty (20) days from the filing of the Order.

The Initial TRO Parties to this docket submitted filings in accordance with Order No. 20471. Specifically, AT&T filed its notification letter on October 13, 2003; Oceanic and the DOD filed their notification letters on October 15, 2003; PLNI filed its notification letter on October 17, 2003; Verizon Hawaii filed its notification letter on October 20, 2003

("Verizon Hawaii's Notification Letter"); and the Consumer Advocate filed its notification letter on October 21, 2003. Sprint, on the other hand, filed a letter requesting commission approval to withdraw from this proceeding on October 20, 2003 ("Withdrawal Request").

DIRECT TELEPHONE COMPANY INC. ("DTC") filed its motion to intervene in this proceeding on October 17, 2003 ("DTC's Motion to Intervene"). SANDWICH ISLES COMMUNICATIONS, INC. ("SIC") filed a motion to intervene in this docket also on October 17, 2003 ("SIC's Motion to Intervene"). MCIMETRO ACCESS TRANSMISSION SERVICES, INC. ("MCImetro") filed its motion to intervene in this proceeding on October 20, 2003 ("MCImetro's Motion to Intervene"). No other persons moved to intervene in this docket.

II.

Compliance Filings

A.

Filings of Initial TRO Parties

AT&T, Oceanic, DOD, PLNI, the Consumer Advocate, and Verizon Hawaii timely filed their respective notification letters.³ Sprint indicates that it did "not wish to participate in the docket" since the docket will not impact its business in Hawaii because Sprint does not use unbundled network elements in

³Under Hawaii Administrative Rules ("HAR") §§ 6-61-22 and 6-61-21(e), the deadline for the Initial TRO Parties to submit their respective filings to the commission was Tuesday, October 21, 2003.

Hawaii. We note that Sprint's Withdrawal Request was timely filed.

The commission finds that the Initial TRO Parties have complied with the filing requirements of the Order. We also find good cause to approve Sprint's withdrawal from this docket, and we conclude that Sprint's Withdrawal Request should be approved.

B.

Motions to Intervene

DTC's, SIC's, and MCImetro's motions to intervene were filed pursuant to Order No. 20471, which invited any interested individual, entity, or organization to file a motion to intervene or participate without intervention within twenty (20) days of the date of the Order, in compliance with all applicable rules of HAR Chapter 6-61. DTC's, SIC's, and MCImetro's motions to intervene were all timely filed, and there were no oppositions to any of these motions to intervene.

1.

DTC's Motion to Intervene

DTC is a CLEC authorized to provide telecommunications services in the State of Hawaii.⁴ DTC requests commission

⁴DTC was granted a certificate of authority ("COA") to operate as a reseller of telecommunication services in the State of Hawaii ("State") through Decision and Order No. 19265, filed on March 25, 2002, in Docket No. 01-0460. DTC's COA was amended to allow it to provide telecommunications services also as a facilities-based carrier by Decision and Order No. 19840, filed on December 4, 2002, in Docket No. 02-0209. The commission granted DTC's request to provide shared tenant services, on a temporary basis, in Interim Decision and Order No. 20410, filed on August 29, 2003, in Docket No. 03-0240.

approval to intervene in Parts I and II of this docket.⁵ DTC specifically makes reference to various criteria set forth in HAR § 6-61-55. DTC represents that as a "responsible contributor" to the State's economy, it wishes to support DTC's services in the State through active involvement in this docket and wants to provide CLEC input on the needs "for a fully competitive environment and a level playing field with the ILEC."⁶ DTC also contends that it will be precluded from providing input on issues important to CLEC services to enterprise and mass-market customers through unbundled network element platform without intervention in this docket, and states that intervention in this docket represents its only means to protect its interests which cannot be fully represented by any existing party to this docket. Moreover, DTC contends that it can assist in the development of a sound record and requests that it be granted the same party status that other CLECs currently enjoy.

⁵The commission indicated in Order No. 20471 that our implementation of the FCC's requirements under the *TRO* will be conducted in two distinct and separate parts. The FCC gave state commissions ninety (90) days from the effective date of the order to rebut the FCC's "national finding" of no impairment for switching for large business customers served by large capacity loops ("90-day Review"). Additionally, the FCC gave state commissions nine (9) months from the effective date of the *TRO* to determine whether or not economic and operational impairment exist in particular geographic markets for mass-market customers ("9-month Review"). The commission stated that it would address its 90-day Review obligations in Part I of this proceeding and its obligations associated with a 9-month Review in Part II of this proceeding.

⁶See, DTC's Motion to Intervene at 4.

SIC's Motion to Intervene

SIC states that it is the State's sole rural local exchange carrier. SIC represents that it was issued an exclusive license to provide intrastate telecommunications services on lands administered by the Department of Home Lands of the State of Hawaii ("DHHL") in 1995. In 1997, the commission granted SIC a COA to provide telecommunications in the State, restricted to providing these services to lands administered by the DHHL.⁷ SIC seeks to intervene in this docket to protect its interests as the sole provider of telecommunications on lands administered by the DHHL. SIC argues that it is not a CLEC and contends that it has an interest in interconnection arrangements with Verizon Hawaii as an ILEC to ILEC, and states that participating as a party to this docket is the only means to protect its interests. As such, SIC states that the existing parties to this proceeding cannot adequately represent its interests. SIC also states that it will assist in the development of a sound record by clarifying: (1) that there are "two ILECs operating in the State"; and (2) "ILEC to ILEC interconnection requirements consistent with the public interest."⁸ SIC contends that the issues it raises will only serve to clarify its status as a provider of telecommunications services in the State and that its intervention should not impact or delay the proceedings in this docket.

⁷See, Order No. 16078, filed on November 14, 1997, in Docket No. 96-0026.

⁸See, SIC's Motion to Intervene at 4.

3.

MCImetro's Motion to Intervene

MCImetro, an authorized provider of telecommunications services in the State,⁹ seeks to intervene in Part II of this proceeding. MCImetro is intervening in this proceeding to provide input since it expects this proceeding will affect the provision of telecommunications services to its Hawaii customers. While it recognizes that some of its interests may overlap with the interests of existing parties to this proceeding, MCImetro contends that its interests will not be fully and adequately represented without intervention in this proceeding and that there is no other reasonable means to protect its interests. MCImetro represents that participation from all major telecommunications providers is consistent with purposes of an investigatory proceeding, and that its intervention in this proceeding will not broaden the issues or unduly delay this proceeding. Furthermore, it contends that it will assist us in developing a sound record and help to insure that our determinations are just and reasonable.

4.

Intervention Findings and Conclusions

Intervening as a party in commission proceedings is governed by HAR § 6-61-55. Specifically, HAR § 6-61-55(d) states that intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden

⁹See, Decision and Order No. 15898, filed on September 10, 1997, in Docket No. 97-0190.

the issues. The Supreme Court of Hawaii clarified that party status through intervention in a proceeding before the commission "is not a matter of right but is a matter resting within the sound discretion of the commission."¹⁰

The commission initiated this docket to investigate, implement, and address our obligations under the TRO, specifically those associated with a 90-day Review and 9-month Review. To this end, we invited any interested individual, entity, or organization to intervene as a party or to participate without intervention in this proceeding by filing a motion to do so in an effort to "encourage public input and to ensure, as much as possible, a comprehensive examination of the issues".¹¹ We find that DTC, SIC, and MCImetro each have an interest in the proceedings in this docket since they each provide telecommunications services in the State, and granting their intervention request should, at this time, be reasonably pertinent to and should not unreasonably broaden the issues associated with our investigation. Their participation in this docket will, we believe, assist us in our investigation and in the development of a sound record. Accordingly, we conclude that

¹⁰See, *In re Application of Hawaiian Electric Company, Inc.*, 56 Haw. 260, 262 (1975).

¹¹See, Order No. 20471 at 5.

DTC's, SIC's, and MCImetro's motions to intervene should be granted, subject to the conditions set forth below.¹²

We must remind DTC, SIC, and MCImetro that their participation in this docket is limited to the matters that are reasonably pertinent to these proceedings. Specifically, we stress that the commission's focus in these proceedings is limited to only the issues related to our review and obligations associated with a 90-day Review and 9-month Review under the TRO. In light of the short timeframes established by the FCC, we may reconsider and/or limit DTC's, SIC's, and MCImetro's participation as parties to this docket if we determine that they are either unreasonably broadening the issues pertinent to our review and obligations under the TRO or unduly delaying the proceedings in this docket.

C.

Part I: 90-Day Review

The FCC gave state commissions 90 days from the effective date of the TRO to rebut its "national finding" that competitors are not impaired without access to an ILEC's circuit switching when serving enterprise customers through high capacity

¹²We clarify, at this time, that SIC is being granted intervention in this proceeding as an authorized provider of telecommunications services in Hawaii, restricted to providing services on lands administered by the DHHL and other representations made in its motion, and not on its claim that it is an ILEC. If SIC desires to pursue its ILEC status claim, it must do so in a proceeding separate and apart from the proceedings in this docket since a review of its ILEC status claim is not, we believe, reasonably pertinent to the issues associated with this docket, and a review of SIC's claim would unduly delay these proceedings.

loops ("No Impairment Finding").¹³ Due to the short time frame and other TRO requirements associated with a 90-day Review, the commission determined that it was reasonable to go forward with a 90-day Review of the FCC's No Impairment Finding upon a filing of a motion for the commission to proceed ("Motion to Proceed") by a CLEC within twenty (20) days from the filing of the Order.¹⁴ The commission reasoned that it would result in a waste of the commission's resources and impede the commission's ability to timely adhere to the FCC's deadline if we proceed without a Motion to Proceed.

No Motion to Proceed was filed in this proceeding within the parameters set forth in Order No. 20471. Without a filing of a Motion to Proceed by a CLEC, we believe that a 90-day Review of the FCC's No Impairment Finding is unsustainable and that such a review should not be embarked upon. The commission does not have the resources and necessary information to embark on such a proceeding without some indication from Hawaii's CLEC community that the FCC's No Impairment finding should be rebutted, especially within the FCC's TRO expedited time line. Thus, we conclude that this commission should not undertake a 90-day Review of the FCC's No Impairment Finding.

¹³See, TRO at ¶ 421.

¹⁴See, Order No. 20471 at 6.

III.

Part II: 9-month Review

The commission initially moved forward with its 9-month Review in this docket under the assumption that such an analysis was sustainable in Order No. 20471. The commission informed the Initial *TRO* Parties and all reviewers of the Order that it would require the parties to this docket to meet informally to develop a stipulated protective order, if necessary, and a stipulated procedural/prehearing order to govern the matters of our 9-month Review in Part II of this proceeding.

In Verizon Hawaii's Notification Letter, Verizon Hawaii conveys its belief that there is no need for proceedings in either parts of this docket. Verizon Hawaii contends that a 90-day Review is unsustainable and that such a review should not proceed. Regarding Part II of this docket, Verizon Hawaii suggests that no proceeding is necessary since "it will not challenge the FCC's impairment findings in Hawaii during the period allowed for a 9-month case."¹⁵ Additionally, Verizon Hawaii suggests that a review of its hot cut process to develop and implement a batch cut process is unnecessary since the commission's hot cut/batch cut obligations under the *TRO* are triggered only in markets where an impairment evaluation is being requested. The FCC, in ¶ 488 of the *TRO*, specifically required state commissions to approve a batch cut migration process to be implemented by ILECs to address the cost and timeliness of the hot cut process or make a detailed finding explaining why such a

¹⁵See, Verizon Hawaii's Notification Letter at 2.

process is unnecessary within nine (9) months of the effective date of the TRO ("Hot Cut/Batch Cut Requirements"). Verizon Hawaii appears to indicate that it is unnecessary to conduct a review of its hot cut process since Verizon Hawaii is not challenging the FCC's impairment finding in any Hawaii markets within the TRO 9-month Review period.

AT&T submitted a letter dated October 28, 2003 ("AT&T's Comments") to address certain statements set forth in Verizon Hawaii's Notification Letter. AT&T disagrees with Verizon Hawaii's suggestion that a 9-month Review is unnecessary. AT&T contends that the FCC requires state commissions to determine what constitutes "mass-market" in ¶ 497 of the TRO, and states that Verizon Hawaii's "waiver of any claim that mass[-]market customers are not impaired by the unavailability of switching does not eliminate the need for the [c]ommission to make the cut-off determination discussed in ¶ 497 of the" TRO.¹⁶ Accordingly, AT&T urges the commission to establish a schedule that results in the determination "of the maximum number of DS-0 loops at a location that may be purchased in connection with unbundled local switching from Verizon Hawaii"¹⁷ as required under ¶ 497 of the TRO.

Verizon Hawaii filed a statement on November 7, 2003, in response to AT&T's Comments (Verizon Hawaii's Comments). Verizon Hawaii clarified that it "declined to challenge" the FCC's impairment finding, at this time, as opposed to accepting

¹⁶See, AT&T's Comments at 2. Internal quotes deleted.

¹⁷*Ibid.*

the FCC's impairment finding as misstated by AT&T. Verizon Hawaii also states that it opposes AT&T's assessment of Verizon Hawaii's position on the issue of developing a batch hot cut process and asserts that AT&T's suggestion that a new batch cut process must be developed conflicts with the TRO. Furthermore, Verizon Hawaii states that it does not object to AT&T's contention that the cross-over point for enterprise and mass-market customers be addressed, and states that it is willing to work with AT&T and the other parties to this docket to establish a filing schedule to address this matter.

We acknowledge Verizon Hawaii's decision in this proceeding to not challenge the FCC's impairment finding in any of Hawaii's markets during the time allotted for a 9-month Review; however, we believe it is premature to assume that a 9-month Review is unnecessary, as Verizon Hawaii initially suggested. AT&T advances a position that a cut-off determination under ¶ 497 for mass-market and enterprise customers is an issue to be addressed in this proceeding. Additionally, we are not fully convinced that the commission is relieved of its obligations under the FCC's Hot Cut/Batch Cut Requirements since the FCC made its national finding of impairment for mass-market customers based largely on its determination that economic and operational barriers for the cut over process results in the impairment. We believe that it is premature to conclude that an evaluation of Verizon Hawaii's hot cut process and the development of a new batch cut process are unnecessary. We believe that input from all parties to this docket [the Initial TRO Parties and the parties to this proceeding named in

this order (collectively, the "TRO Parties")], on this issue is warranted.

Due to the short deadlines in this proceeding, the commission finds it appropriate and in the public interest to require the TRO Parties to meet informally in an effort to formulate the issues, a schedule of proceedings, and all other procedural matters necessary to govern the review under the 9-month Review time line in a stipulated prehearing order. The stipulated prehearing order must be submitted for our consideration and approval within thirty (30) days from the date of this order. If unable to stipulate to such an order, each party is required to submit separate proposed prehearing orders for our review and consideration within thirty (30) days from the date of this order.

During the informal meeting, we suggest that the TRO Parties attempt to discuss and develop a procedural schedule that incorporates the parties' "final briefs" or "reply briefs", if any, to be filed on or about June 2, 2004, since the FCC's 9-month deadline for the commission to complete its review expires on July 2, 2004. Additionally, when developing the issues to be addressed in this proceeding, the parties should consider and include, if necessary, the following matters:

- (1) What is the appropriate cross over point between enterprise and mass-market customers?
- (2) Is a review of Verizon Hawaii's hot cut process and the development a new batch cut process, if found warranted, necessary under the TRO when Verizon Hawaii has decided to not challenge the

FCC's finding of impairment in any of the State's markets during the 9-month Review?

- (3) What type of procedures should be developed to conduct continued reviews for unbundled switching under § 526 of the TRO? Should the procedures include a notification requirement?

The above list of issues to consider is not exhaustive, and is provided for the TRO Parties' consideration when developing the issues to be addressed in this proceeding consistent with the FCC's TRO requirements under the 9-month Review.¹⁸ The TRO Parties also should meet informally to discuss whether or not a stipulated protective order for this proceeding is necessary. The stipulated protective order also should be filed for the commission's consideration and approval within thirty (30) days from the date of this order. If unable to stipulate to such an order, each party should submit separate proposed protective orders for our review and consideration within thirty (30) days from the date of this order.¹⁹

¹⁸The commission envisions having all TRO filings made in this docket accessible for the public's inspection on the commission's website at <http://www.hawaii.gov/budget/puc/puc.htm>. At this time, we request each party to this docket to submit an electronic copy of all its filings (including those previously filed) to the commission's general electronic mail address at Hawaii.PUC@hawaii.gov for up-loading on to the commission's website.

¹⁹If a stipulated protective order or proposals of protective orders are not filed within the 30-day deadline, the commission will assume that no protective order is necessary.

IV.

Orders

THE COMMISSION ORDERS:

1. Sprint's Withdrawal Request is approved.
2. The motions to intervene by DTC, SIC, and MCImetro, to the extent requested in their respective motions, are granted, subject to the conditions set forth in Section II.B.4 of this order. Thus, DTC, SIC, and MCImetro join the Consumer Advocate, AT&T, DOD, PLNI, Oceanic, and Verizon Hawaii as parties to this docket.
3. A 90-day Review of the FCC's No Impairment Finding shall not be undertaken.
4. The TRO Parties shall meet informally to formulate the issues, a schedule of proceedings, and all other procedural matters necessary to govern the review under the 9-month Review time line in a stipulated prehearing order. The stipulated prehearing order must be submitted for our consideration and approval within thirty (30) days from the date of this order. If unable to stipulate to such an order, each party is required to submit separate proposed prehearing orders for our review and consideration within thirty (30) days from the date of this order.
5. The TRO Parties also shall meet informally to discuss whether or not a stipulated protective order for this proceeding is necessary and make such a filing, if such an order is warranted, in this docket under the parameters set forth in Section III of this order.

DONE at Honolulu, Hawaii this 11th day of December,
2003.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Carlito P. Caliboso, Chairman

By _____
Wayne H. Kimura, Commissioner

By _____
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Ji Sook Kim
Commission Counsel

03-0272.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 20712 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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